Filed 10/7/04 P. v. Nelson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ALLEN NELSON,

Defendant and Appellant.

F043776

(Super. Ct. No. LF005528A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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Richard Allen Nelson stands convicted, following a jury trial, of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c); count 1),[1] eluding a

[1] All statutory references are to the Penal Code unless otherwise stated.

pursuing peace officer with a willful or wanton disregard for safety (Veh. Code, § 2800.2; count 2), and resisting or deterring an executive officer (§ 69; count 3). Following a bifurcated court trial, he was found to have been sane when he committed the offenses, and to have suffered five prior "strike" convictions (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)). Sentenced to 75 years to life in prison and ordered to pay various fines, he now appeals, contending the trial court erred by imposing multiple punishment. For the reasons which follow, we will modify the sentence, but otherwise affirm.

FACTS[2]

Shortly after 12:30 a.m. on December 21, 2002, California Highway Patrol (CHP) Officer McCarron was in uniform, on duty, and riding a marked CHP motorcycle northbound on Interstate 5 in Los Angeles. As he approached Valencia Boulevard, the speed limit dropped from 65 to 55 miles per hour due to a construction zone near Magic Mountain.

As McCarron entered the construction zone, he noticed a teal-colored Ford Explorer being driven by Nelson at approximately 82 miles per hour. McCarron positioned his motorcycle alongside in an attempt to get Nelson's attention, and the two made eye contact. Nelson accelerated; McCarron kept pace and again established eye contact. McCarron intended to contact Nelson concerning his speed in a construction zone, but Nelson suddenly veered into McCarron's lane of travel. McCarron was forced to swerve and slam on his brakes to avoid a collision. In swerving, he came a matter of inches from a concrete jersey wall barrier.

McCarron positioned himself behind and to the left of Nelson's vehicle, and activated his lights and siren. Nelson sped up and wove in and out of traffic across all

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[2] In light of the issues raised on appeal, we omit the sanity phase evidence.

three lanes.[3] While in the construction zone, Nelson was driving approximately 90 miles per hour, although the pursuit reached 105 miles per hour for several minutes.

As they exited the construction zone and approached Hazard Canyon Road, McCarron saw material coming from the driver's side window of Nelson's vehicle. A lot of it was paper, but McCarron also saw some change and what looked like a couple small pieces of wood, and he thought he saw a piece of glass shatter. The bulk of the debris struck the front of his motorcycle, but some hit McCarron in the helmet and a small portion hit him in the face. As McCarron saw the debris coming, he applied his brakes and swerved to try to avoid striking most of it. At the same time, Nelson applied the Explorer's brakes and swerved in the same direction as McCarron. Although speeds varied, Nelson and McCarron were still traveling between 80 and 100 miles per hour. When Nelson applied his brakes, his bumper came less than a car length from McCarron's motorcycle.[4] McCarron dropped back about 10-15 car lengths from the Explorer and moved to the right rear of the vehicle. The same kind of debris now came out of the passenger's side window, but McCarron managed to avoid most of it. Nelson continued to swerve in and out of what was now four lanes of traffic. At times, he used the center divider to pass vehicles.

At Lake Hughes Road and then the Frazier Park exit in Gorman, two patrol car units joined the chase. As CHP policy is to have two vehicles in pursuit, McCarron dropped out at the Frazier Park exit, which is in Kern County. All told, he had pursued Nelson for some 38-42 miles.

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[3] Although traffic was light, it was somewhat condensed at this location because the road contracted from four lanes to three narrow lanes due to the construction.

[4] An average car length is about 10-12 feet.

CHP Officers Huot and Yanez, who were assigned to the Fort Tejon area, responded to the Gorman area in a marked CHP vehicle when they were notified of the pursuit. The officers – both of whom were in uniform – took over the pursuit position closest to Nelson's vehicle, with lights and siren activated. During the time they were involved in the pursuit, Nelson's speed varied from 80-105 miles per hour as he worked his way through traffic.

On the downgrade, Nelson began to make sharp, sudden lane changes, and to close on what traffic there was to the point that impact appeared imminent before he moved around the slower vehicle. Approximately a mile south of the bottom of the Grapevine, Nelson was traveling approximately 80 miles per hour when he came upon a big rig, for which the speed limit was 35 miles per hour. Nelson quickly slowed, then made a sharp lane change and rear-ended a van that was traveling northbound at approximately 65 miles per hour. Nelson's vehicle came to a stop in the traffic lanes with Nelson pinned against the steering wheel, unconscious. Huot had to extricate him from the vehicle.

In giving an overview of the case to the jury, the prosecutor asserted that Nelson's driving pattern was egregious, and that he endangered people's lives by speeding and swerving in and out of traffic. The prosecutor argued that Nelson threatened Officer McCarron with his vehicle by almost forcing him off the road, and that he threw debris which hit McCarron and also suddenly slowed so that his vehicle nearly struck the motorcycle. The prosecutor noted that Nelson was still maintaining his reckless driving pattern when the other officers joined the pursuit.

Turning specifically to the charge of assault with a deadly weapon on a peace officer, the prosecutor argued that Nelson's vehicle constituted the deadly weapon. The prosecutor noted that he had to prove Nelson willfully committed an act which, by its nature, would probably and directly result in the application of physical force to another. The prosecutor told the jury:

"What I'm talking about initially … is when Officer McCarron attempted to make contact with the defendant the second time by driving up to his window and making eye contact …, and at that time the defendant threatened Officer McCarron with a vehicle because he swerved into Officer McCarron's lane.

"The swerve wasn't a gradual swerve. It was, as Officer McCarron testified, a sudden move left or a jerk left, and it caused Officer McCarron to almost go into the cement block that was on the left side of that … lane. That is a threat. That is an assault by the defendant with that vehicle upon Officer McCarron.

"Well, the defendant also assaulted Officer McCarron in another way. I'm talking about the debris that he was throwing out of the driver's-side window.

"And when Officer McCarron was getting hit with that debris, the defendant slammed on his brakes. He slams on his brakes going 90 miles an hour, probably reduces his speed to 80 miles an hour or some sort. Officer McCarron was only three car lengths away from him.… [¶] … [¶] The defendant willfully applying those brakes, you can infer he meant for Officer McCarron on a motorcycle to collide with the rear of his vehicle, assaulted Officer McCarron."

With respect to the charge of eluding a pursuing officer, the prosecutor argued that Nelson's driving pattern proved he willfully fled, as he had numerous opportunities to pull over. The prosecutor asserted that Nelson willfully eluded all of the officers involved in the pursuit, and pointed out that the pursuit was 47 miles long and only ended when Nelson crashed. He subsequently told jurors: "You can conclude from the evidence that the defendant had the specific intent to evade the officers during this pursuit and you can reach that conclusion at any point during this pursuit. It doesn't have to be at the end when he collided with the maroon van."

With respect to count 3, the prosecutor argued that Nelson attempted to deter McCarron from performing his duties by refusing to stop when McCarron tried to pull him over. He further argued that Nelson attempted to deter the CHP officers (including Huot) by willfully fleeing from them and refusing to stop. The prosecutor stated: "The defendant could have pulled over at any time, and each time the defendant had the

opportunity to pull over and failed to do so, that is an attempt to deter California Highway Patrol. It's that simple." The prosecutor then argued that Nelson used threats, force, and violence in his attempt to deter, with the threats arising from his swerving toward McCarron, applying his brakes with McCarron a short distance behind him, and throwing debris from his windows. The prosecutor concluded: "In proving this third count …, you need not look further than the threat, because we can all agree – or at least the evidence was presented the defendant threatened Officer McCarron in at least three separate ways, the debris that was thrown from the windows and the driving pattern, the swerve to the left and the braking, applying the brakes. Those are three separate threats, and you can use any three of them to determine the defendant guilty of this charge."

Defense counsel asked the jury to find Nelson guilty of lesser offenses as to all three charges. The prosecutor responded that Nelson sped and wove in and out of traffic "for 47 miles, with a purpose he wanted to get away from the officers because they were going to stop him." He urged jurors to consider the case as a whole, and not to be "picking out the first swerving and analyzing it, what was his intent at that point, picking out the debris coming through the windows and then analyzing it." He told jurors "to consider the circumstances as they happened, the whole half hour of the pursuit." He argued that one assault occurred when Nelson swerved his vehicle at McCarron's motorcycle, while a second, separate assault occurred when Nelson slammed on his brakes while McCarron was close behind him. He then stated:

> "That [the instances of assault] kind of dovetails into Count Number 3 …. [B]y driving away in a vehicle you cannot use that as a force, but Penal Code Section 69 also states delaying an officer in the performance of his duties through force – through threat, force, or violence.
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> "And we obviously have threat if you believe he intentionally operated the vehicle in Count 1 – if you believe, rather, he intentionally swerved that vehicle to the left or intentionally applied his brakes or, for that matter, threw out the debris from both windows, because those are

examples of threats and those are exactly what the defendant did for Count Number 3."

Jurors were instructed, pursuant to CALJIC No. 17.01, that with respect to each count, the prosecution had presented evidence of more than one act or omission upon which a conviction could be based, and all jurors had to agree on the same act or omission in order to return a guilty verdict. Jurors did not state in their verdicts the specific act(s) on which they based the convictions. During deliberations, however, they sent out a note which stated: "We need Officer McCarron's testimony of when the brakes were applied to deter him." That testimony was read; within 40 minutes of the note, the jury reached a verdict of guilty on all charges.

The probation officer's report recommended imposition of consecutive terms of 25 years to life on each count. However, the probation officer who was present at sentencing expressed concern whether count 3 was distinguishable enough from count 2 so as to justify consecutive terms. When asked to state his position, the prosecutor responded:

> "MR. LUA: Well, Judge, I think we could play the facts in such a way to justify consecutive sentencing. I think also that we can interpret the facts to justify a stay on Count 3. [¶] … [¶] We can interpret the defendant's actions during those 47 miles to justify consecutive sentencing merely by stating that the defendant's initial conduct or initial action insofar as throwing things out of the window could have justified the Penal Code Section 69 against Officer McCarron.
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> "Also his eluding Officer McCarron through the construction zone – and this is after – or even before the defendant threatened Officer McCarron with the vehicle.… [¶] … [¶] As the Court remembers, there are additional California Highway Patrol officers that were engaged in the pursuit coming from Fort Tejon and following it until the defendant ultimately collided with the van and that could justify the 2800.2 or the felony evading.
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> "And the driving pattern described by the officers of the defendant was such that he was weaving in and out of lanes, going right up against big rigs and then changing lanes immediately. They even observed him driving in the center divider, passing vehicles on the left and on the roadway, which

was not part of the lanes, and ultimately, when trying to negotiate a quick turn from … behind a tractor-trailer, that's when he collided with the maroon van that was traveling at a far slower speed than maybe even he anticipated.

"So in playing the facts there is justification for consecutive sentences, but I would submit that to the Court.

"THE COURT: You're saying you're not that – let me see if I understand your thought process.

"You're saying that the assault with a deadly weapon is the moving of the vehicle into the path of Officer McCarron's BMW motorcycle.

"MR. LUA: Correct.

"THE COURT: And the PC 69 amounts to the throwing out of the window from the vehicle picture frames, glass, other items that hit, I don't know, the officer and/or his body, and that the evading – the PC – I'm sorry, the CVC 2800.2 is the chase that ensued after Fort Tejon officers gave chase to the vehicle.

"MR. LUA: Yes.

THE COURT: And the vehicle was eluding at an excessive rate of speed with the officers Code 3 following?

"MR. LUA: Correct."

Defense counsel merely stated his agreement with the probation officer.

Subsequently, in sentencing Nelson, the court stated:

"In terms of the appropriate sentencing, the Penal Code Section 667(e)(2)(A)(ii) or Penal Code Section 1170.12(c)(a)(1)(ii) scheme of 25 years to life is … appropriate in this case. Inasmuch as Penal Code Section 667(e)(2) requires a maximum term to be the greatest of the three possibilities, I believe the 25-years-to-life sentence is mandated and will be recommended and will be imposed as to each count.

"I feel consecutive sentencing is justified per our earlier comments and is appropriate inasmuch as, one, the crimes were committed at different times or separate places, as we've chronicled earlier, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

"To define a single period of aberrant behavior I think it would stretch the concept here. We have over a 30-mile range. We have multiple officers involved, multiple acts, glass thrown from a car amounting to – appear to be like a flying guillotine at the officer.

"Two, the crimes involve separate acts of violence or threats of violence, as I've indicated."

DISCUSSION

Nelson says the imposition of multiple punishment constituted an abuse of discretion, and violated section 654 and his constitutional rights.[5] In large part, he challenges the court's determination of what act(s) constituted each offense, and he concludes that two of his sentences must be stayed.

We must first determine whether the trial court could properly rely on the acts it did as the basis for each count. It is possible, as Nelson asserts, that the jury relied on different acts as the basis for their verdicts.[6] Accordingly, we must decide whether Nelson's rights to due process or a jury trial were violated by the prosecutor switching theories or the trial court possibly basing its sentencing choices on acts other than those on which the jury based its verdicts.[7]

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[5] Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

[6] This is especially true as to count 3, since the jury's note indicates jurors were considering Nelson's sudden braking action as an attempt to deter McCarron. We find it less likely jurors based both count 1 and count 3 on the same act. The most assaultive behavior was Nelson's act of swerving toward McCarron so suddenly that McCarron was nearly forced into the concrete barrier in the construction zone. It is difficult to believe jurors would have overlooked or ignored this conduct.

[7] Although defense counsel did not object on any of the grounds Nelson now raises, claims of error under section 654 are not waived by a failure to object. (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Scott* (1994) 9 Cal.4th 331, 354 & fn. 17.) The

We do not believe the prosecutor impermissibly changed theories. As is apparent from the statement of facts, *ante*, he presented all three acts – the swerve, the throwing of debris, and the sudden braking – as bases for both counts 1 and 3. Despite the unfortunate reference to "playing the facts," his argument at sentencing was based entirely on the evidence and argument he had previously presented to the jury. There was no unfairness. The cases relied on by Nelson, such as *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129 (reversal required when prosecutor presents case on alternate theories, some of which are legally inadequate; but reversal not required when some are factually inadequate); *People v. Green* (1980) 27 Cal.3d 1, 69, disapproved on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239 and *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3 (same re: legally incorrect theories); *Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 117-118 (judicial estoppel generally precludes party from taking two totally inconsistent positions); *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181, 183 (same); and *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045, 1057-1059, reversed on other grounds *sub nom*. *Calderon v. Thompson* (1999) 523 U.S. 538 (absent significant new evidence, prosecutor cannot offer inconsistent theories and facts regarding same crime in order to convict two defendants at separate trials), are inapposite.

We turn to whether the trial court could properly rely on acts for sentencing purposes which may or may not have been the acts upon which jurors based their verdicts. We agree with Nelson that the violation of Vehicle Code section 2800.2 could not be fragmented, at least where, as here, the vehicle was continuously in motion.[8]

People do not assert waiver and, as Nelson's constitutional claims are interwoven with those involving section 654, we will address them on the merits.

[8] We express no opinion concerning a situation in which, for example, a driver successfully eludes one officer, stops for some purpose upon reaching what might be

Subdivision (a) of that statute allows felony punishment to be imposed "[i]f a person flees or attempts to elude a pursuing peace officer in violation of [Vehicle Code] Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property …." Since felony evading, as defined by that statute, is not a crime of violence and the statutory language contemplates a continuous course of driving (even if over a lengthy period of time), a person may only be convicted of one count of violating the statute even though the pursuit may have involved multiple peace officers in multiple vehicles. (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1162-1164; see *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.) It follows that one count of violating Vehicle Code section 2800.2 cannot be fragmented into different segments, according to which officer or locale was involved, for sentencing purposes.

With respect to counts 1 and 3, we conclude that, under the circumstances of this case, the court properly could rely on the acts of swerving and throwing debris out of the windows, respectively, in terms of its sentencing decisions.[9] As noted, the prosecutor presented all three acts to the jury as justification for convictions on counts 1 and 3. Although Nelson argues that the threat posed by the debris and its deterrent effect were relatively weak, he does not claim any of the acts could not, as a matter of law, have supported either of the counts. Significantly, given the defense (which was to rely on the state of the evidence and argue for conviction on lesser offenses based not on lack of credibility of any of the witnesses, but upon whether, for example, Nelson intentionally swerved at McCarron or simply drifted out of the lane when he glanced over and

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described as a place of temporary safety, and then is pursued from there by a second officer.

[9] While we agree that the trial court overstated the evidence in likening the glass to a flying guillotine, we reject the notion that the acts relied on by the court were unsupported by the evidence.

overcorrected), there was no rational basis upon which jurors could have concluded that some, but not all, of the acts occurred. Given this fact, the jury necessarily found the acts upon which the trial court relied. Accordingly, Nelson's right to a jury determination – the parameters of which we need not determine – was not violated. (See *Ring v. Arizona* (2002) 536 U.S. 584, 609; *Harris v. United States* (2002) 536 U.S. 545, 549-550, 557-568; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-490; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-326.)[10] Nor did the trial court abuse its discretion or violate Nelson's right to due process.

We must next determine whether, given the acts for which the trial court sentenced Nelson, consecutive terms were mandatory pursuant to the three strikes law.[11] In this regard, sections 667, subdivision (c)(6) and 1170.12, subdivision (a)(6) both require that a defendant be sentenced consecutively on each count "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts …." (See *People v. Hendrix* (1997) 16 Cal.4th 508, 512.)

"[S]ection 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively. Rather, if a defendant commits two crimes,

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10 In light of our conclusion, we need not determine whether *Apprendi* and its progeny apply to section 654 determinations. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021-1022 [*Apprendi* inapplicable because § 654 is not sentencing enhancement statute, but sentencing reduction statute]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 269-271 [same].)

11 While it is unclear whether the trial court or parties below recognized the existence of this issue, it has been addressed on appeal. If imposition of consecutive sentences was mandatory, then any other sentence is unauthorized (see *People v. Carter* (1995) 41 Cal.App.4th 683, 687, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10), and we must affirm the result reached by the trial court regardless of its reasoning (see, e.g., *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1119, fn. 4).

punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed. [Citation.] Section 654 does not allow *any* multiple punishment, whether concurrent or consecutive. [Citation.] Thus, the question of whether sentences should be concurrent or consecutive is separate from the question of whether section 654 prohibits multiple punishment. [Citation.]" (*People v. Deloza, supra,* 18 Cal.4th at p. 594.)

"Even though under the three strikes law, section 654 is irrelevant to mandatory consecutive sentencing, mandatory consecutive sentencing may be relevant to section 654. … [T]he mandatory consecutive sentencing provisions state that, where the 'same occasion/same operative facts' test is *not* satisfied, the trial court 'shall' sentence consecutively, '[n]otwithstanding any other law ….' [Citations.] It could be argued that this creates a legislative exception to section 654. [Citations.]" (*People v. Danowski* (1999) 74 Cal.App.4th 815, 823.) In our view, it *does* constitute such an exception: the phrase "[n]otwithstanding any other law" is clear and unambiguous; "[i]f the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs. [Citations.]" (*People v. Johnson* (2002) 28 Cal.4th 240, 244.) "The three strikes law is a comprehensive, integrated sentencing scheme which applies to *all* cases coming within its terms. [Citations.]" (*People v. Casper* (2004) 33 Cal.4th 38, 41-42, italics added.) Thus, sections 667, subdivision (c)(6) and 1170.12, subdivision (a)(6) "mandate[ ] consecutive sentencing for *any* current felony convictions not committed on the same occasion, and not arising from the same set of operative facts. Consecutive sentencing is not mandated under [these provisions] if the current felony convictions are committed on the same occasion or arise from the same set of operative facts." (*People v. Hendrix, supra,* 16 Cal.4th at p. 513.)

"The phrase 'committed on the same occasion' is commonly understood to refer to at least a close temporal and spatial proximity between two events, although it may involve other factors as well." (*People v. Deloza, supra,* 18 Cal.4th at p. 594.) It is

properly found when crimes occur almost simultaneously or through the same criminal act directed against multiple victims, but not when they are committed at separate locations or against entirely separate groups of victims, even if the later crimes occurred while the perpetrator was still in flight from the initial crime scene. (*People v. Lawrence* (2000) 24 Cal.4th 219, 228-229.) Here, the offenses underlying counts 1 and 3 were committed at separate times and locations. (See *id.* at pp. 228, 234 [crimes not committed on same occasion where separated spatially by at least one to three city blocks, and temporally by at least two to three minutes].) Since each was committed during the course of conduct which constituted count 2, however, each was committed on the same occasion as count 2.

With respect to whether the convictions arose from the same set of operative facts, the Supreme Court has interpreted the phrase to mean "sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted …." (*People v. Lawrence, supra,* 24 Cal.4th at p. 233.) Based on that definition, the court concluded that the offenses before it did not arise from the same set of operative facts: "Defendant's initial crime was the shoplifting theft of a bottle of brandy from a market. Although still in flight from the crime scene, he thereafter chose to commit new and different offenses: the trespass into the Rojas/LaVastida backyard, and the ensuing assaults against Rojas and LaVastida. The first crime involved an act of theft directed at one group of victims, the second involved assaultive conduct directed at an unrelated pair of victims. The two criminal episodes were separated spatially by at least one to three city blocks, and temporally by two to three or more minutes (from the time defendant stole the brandy from the market until the point he committed the aggravated assault upon LaVastida after having fled from the first crime scene, trespassed into the Rojas/LaVastida backyard, and fled again, chased by Rojas out of the yard and down a long driveway to the street, where he hit LaVastida with the bottle before being subdued)." (*Id.* at pp. 233-234.)

The *Lawrence* court found the rationale of *People v. Durant* (1999) 68 Cal.App.4th 1393 "instructive on the meaning and probable intent behind use of the phrase 'same set of operative facts' …." (*People v. Lawrence, supra,* 24 Cal.4th at p. 233.) In *Durant*, the Court of Appeal reversed the imposition of concurrent sentences, and remanded for resentencing, where the defendant was convicted of one count of burglary and two counts of attempted burglary, all of which were committed within the same housing complex and without intervening events. In part, the court stated:

> "We are aware the phrase 'the same set of operative facts' has been judicially interpreted in collateral estoppel and election of remedies cases to refer to those facts which prove a criminal or civil defendant's liability for a particular wrongful act. [Citations.] Generally, '[w]here the language of a statute uses terms that have been judicially construed, "'the presumption is almost irresistible'" that the terms have been used "'in the precise and technical sense which had been placed upon them by the courts.'" [Citations.] This principle applies to legislation adopted through the initiative process. [Citation.]' [Citation.] While we have not found this exact phrase construed in other statutes, it has often been used by courts to refer to the facts of a case which prove the underlying act upon which a defendant has been found guilty. This meaning comports with the finding made by the court in *People v. Martin* (1995) 32 Cal.App.4th 656, 663-664, disapproved on another point in *People v. Deloza*, *supra*, 18 Cal.4th at page 600, footnote 10, that although '… the term "operative facts" has not always been used in precisely the same way [citations], [the court] believe[d] that in section 667, subdivision (c)(6) [such term] relates to the facts underlying the current charged offenses.' [Citation.] We agree and thus believe that consistent with its common usage the enactors of sections 667, subdivisions (b) through (i) and 1170.12 used the phrase 'the same set of operative facts' with such general meaning in mind.
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> "In applying this definition to any particular case, the nature and elements of the current charged offense becomes highly relevant. For example, when a robbery is charged, its continuous nature, its elements and the facts used to support those elements are the 'operative facts' underlying the commission of that crime. If another offense is committed while the facts underlying that robbery are unfolding, it will necessarily arise from the same set of operative facts as the original robbery. However, where the elements of the original crime have been satisfied, any crime subsequently committed will not arise from the same set of operative facts underlying the

completed crime; rather such crime is necessarily committed at a different time. For instance, with the crime of burglary, where the offense is complete when there is an entry into a structure with felonious intent, 'regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed' [citation], the commission after the first burglary of a crime or burglary of another structure necessarily will arise out of different operative facts than those underlying the original offense. We therefore believe the elements and nature of a charged crime as being continuous or complete as defined for purposes of prosecution are additional factors the court must consider in determining whether multiple current crimes were committed on the 'same occasion' and arose from the 'same set of operative facts' when the offenses are committed more than seconds apart.

"Although consideration of such additional criteria may limit the cases in which a defendant might benefit from the trial court's discretionary determination of whether to impose concurrent rather than consecutive terms, under the three strikes law such narrow construction is consistent with the enactor's intent to 'ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.' [Citations.] As the court in *Deloza* noted, such interpretation comports with the three strikes law's focus of recidivism by '[m]aking mandatory consecutive sentences for those current crimes committed on *different* occasions[.]" [Citation.] Such consideration is also consistent with the concept of 'the timing of the current crimes' …; e.g., whether the first current crime is complete or continues when the next current crime is committed is certainly within the concept of duration of 'timespan' of the original crime, or its 'temporal threshold for establishing guilt, i.e., when the offense is complete for purposes of prosecution. [Citation.]' [Citation.]

"Applying the above described additional factors in the context of the present case, we conclude Durant committed three separate offenses, two attempted burglaries which by their nature and elements were completed before he committed a burglary. The crimes did not occur on the 'same occasion' as that term is commonly understood. Nor did the duration of the crimes overlap, each being complete when Durant attempted to enter or successfully entered a residence and then left to go to another residence. [Citation.]" (*People v. Durant, supra,* 68 Cal.App.4th at pp. 1405-1407.)

Construing *Lawrence* and *Durant*, we conclude that counts 1 and 3 did not arise from the same set of operative facts as each other, although each arose from the same set

of operative facts as count 2. Since counts 1 and 3 constituted current felony offenses "not committed on the same occasion, and not arising from the same set of operative facts," imposition of consecutive terms on those counts was mandatory pursuant to sections 667, subdivision (c)(6) and 1170.12, subdivision (a)(6), regardless of whether multiple punishment would have been authorized by section 654.

We turn now to count 2. We find nothing in the three strikes law that mandates imposition of a consecutive term on that count.[12] At least one appellate court has concluded that, at least where consecutive sentencing is not mandatory, "section 654 applies to sentencing under the three strikes law." (*People v. Danowski, supra,* 74 Cal.App.4th at p. 824.) The People likewise do not claim that section 654 is legally inapplicable, only factually so. Accordingly, we must determine whether the trial court violated section 654 by imposing a consecutive term on count 2, or whether such term fell within the court's discretion.

In *People v. Harrison* (1989) 48 Cal.3d 321, 335, the California Supreme Court summarized the law applicable to section 654 as follows:

> "It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]

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12 Subdivision (c)(7) of section 667 and subdivision (a)(7) of section 1170.12 are not implicated because the same occasion/same set of operative facts test is met, and because, although assault with a deadly weapon on a peace officer is a serious felony (§ 1192.7, subd. (c)(11)), Nelson did not suffer a current conviction for more than one serious or violent felony.

> "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or where the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]
>
> "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.] Although the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]"

Generally speaking, the sentencing court determines the defendant's intent and objective under section 654. (*People v. Cleveland, supra,* 87 Cal.App.4th at p. 268.) That court "is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the [People] and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

In the present case, the trial court made no express determination of Nelson's intent and objective, but did find that the crimes were committed at different times and separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior, and that they involved separate acts of violence or threats of violence. This does not settle the question of whether a consecutive term was

properly imposed on count 2 because, as we have discussed, that offense cannot be fragmented under the circumstances of this case.[13]

Although we have no problem upholding the trial court's determination that counts 1 and 3 were divisible in time (see *People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1257), we cannot do so with respect to counts 1 and 2, or counts 2 and 3. Both counts 1 and 3 occurred – albeit separately – during the course of conduct which resulted in the conviction for count 2. Nelson's intent was to elude the pursuing officers, and we do not view a violation of Vehicle Code section 2800.2 as a crime of violence such that separate crimes of violence against separate victims might be found. (See *People v. Hall* (2000) 83 Cal.App.4th 1084, 1089-1090; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784-1785.) Accordingly, Nelson may not be punished separately for count 2. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1205, 1216-1217 [where sole purpose of kidnapping was to facilitate rape, § 654 barred execution of sentence on kidnapping count]; *People v. Sewell* (2000) 80 Cal.App.4th 690, 697 [defendant convicted of murder following high-speed chase and crash that killed passenger; trial court properly stayed sentence on conviction for evading peace officer causing serious bodily injury or death].)

DISPOSITION

The sentence is modified so that execution of the sentence imposed for count 2 is stayed pending the finality of the judgment and service of the sentences on the remaining

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[13] Nelson does not claim the evidence would support a conclusion that he drove the vehicle "in a willful or wanton disregard for the safety of persons or property," as required by Vehicle Code section 2800.2 (but not Veh. Code, § 2800.1), only during the portion of the pursuit involving the Fort Tejon officers. Accordingly, we need not determine whether the offense could ever be segmented based on the nature of the defendant's driving.

counts, the stay to become permanent upon completion of the terms imposed. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting said modification and to forward a certified copy to the Department of Corrections.

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Ardaiz, P.J.

WE CONCUR:

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Vartabedian, J.

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Harris, J.